

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION II

CA 06-980

LINDA GULLEY

March 21, 2007

APPELLANT

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION [F406674]

V.

ST. EDWARD MERCY MEDICAL
CENTER and SECOND INJURY
FUND

APPELLEES

AFFIRMED

SARAH J. HEFFLEY, Judge

Appellant Linda Gulley appeals from the denial of her claim for a five percent permanent partial impairment rating based on a compensable injury she sustained on October 15, 2002. Appellant argues that there is no substantial evidence to support the Commission's determination that she failed to prove she sustained a permanent injury. We find no error and affirm.

Appellant suffers from a myriad of medical conditions and has had multiple surgeries over the past fifty years. Appellant's medical conditions, which are unrelated to her compensable fall, include panhypopituitarism with adrenal insufficiency, seizure disorder, sleep disorder, blackout spells, type 2 diabetes mellitus, orthostatic hypotension,

hypothyroidism, hypoparathyroidism, glaucoma, restless leg syndrome, chronic skin infections, kidney stones, hearing loss, mental slowness, moderate to severe depression, and hypocalcemia. Appellant also has a history of back pain and a pelvic fracture of both pubic rami, which resulted from a work-related injury in 1992. At the time of the incident on October 15, 2002, appellant was taking between twelve and seventeen medications.

On October 15, 2002, appellant was working for appellee St. Edward Mercy Medical Center (St. Edward), where she was a seventeen-year employee. Appellant was reaching down to pick up a chart when the chair she was sitting in “flipped,” and she landed on the floor on her right hip. Approximately two weeks later, on November 6, 2002, appellant sought treatment for this injury, complaining of pain in her right hip and back. Appellant was treated by Dr. Keith Holder of the Cooper Clinic. Dr. Holder diagnosed her with “right greater trochanteritis” and prescribed physical therapy and Celebrex. Appellant was returned to work without restrictions. On November 21, 2002, appellant was discharged from physical therapy, with her therapist noting “[p]atient now reports no pain and shopping at Wal-Mart without difficulty.”

Appellant returned to Dr. Holder on December 12, 2002, complaining of pain in her right hip. Dr. Holder resumed the physical therapy and scheduled a follow-up visit to determine if a CT scan was warranted. On December 20, 2002, Dr. Holder recommended that appellant undergo an MRI and increased her Celebrex. He returned her to work with the restriction that she should alternate sitting, standing, and walking as tolerated. An MRI

performed on December 24, 2002, revealed that appellant had neither an acute hip abnormality nor a hip fracture. Appellant visited Dr. Terry Clark, another physician at the Cooper Clinic, on December 27, 2002, and based on the normal results of the MRI, he recommended continued Celebrex use for at least one month but otherwise released appellant to return to work without restrictions. The notes from this visit state that “she feels much better,” “she ambulates without difficulty,” and “she has no tenderness to palpitation of the hip.”

On January 3, 2003, appellant again returned to Dr. Clark, reporting a flare-up of right hip pain. Dr. Clark prescribed Celebrex and made an appointment with the orthopaedics department for further evaluation. Dr. Jeffrey Evans examined appellant on January 13, 2003, diagnosed a right-sided sciatica, and recommended physical therapy for her lower back. Dr. Evans also noted that appellant’s MRI, as well as X-rays of the pelvis and right hip, were normal. On March 19, 2003, Dr. Evans referred appellant to Dr. John Swicegood for pain control and recommended that she undergo an MRI of her lower spine. An MRI of the lumbar spine, performed on April 7, 2003, was normal.

Appellant began treatment with Dr. Swicegood on May 12, 2003. Dr. Swicegood’s initial impression was that appellant suffered post-traumatic right sacroiliac joint pain. At this office visit, appellant underwent a fluoroscopic directed sacroiliac joint injection, which Dr. Swicegood indicated would provide “further definition of the joint.” During the injection procedure, Dr. Swicegood noted “poor filling of the sacroiliac joint” and

“distortion...in the curvilinear joint interface.” Dr. Swicegood also recommended a CT scan of appellant’s pelvis, which was performed on June 13, 2003. The scan showed that she had “mild deformity inferior pubic rami which could be due to previous trauma.” The CT report also noted degenerative change of the sacroiliac joints.

Appellant was next seen regarding her hip problem on October 1, 2003, when she visited Dr. Evans for a follow-up. Dr. Evans noted that her condition was unchanged and reiterated the diagnosis of right-sided sciatica. Appellant saw Dr. Evans again on December 3, 2003, and during this visit Dr. Evans noted appellant had a bad fall at home approximately five weeks previously, falling on her right side, on her right hip and shoulder. Dr. Evans noted that appellant had full range of motion of both hips and again assessed appellant’s condition as right-sided sciatica.

On January 8, 2004, Dr. David Kocher, appellant’s family doctor, wrote in response to her insurance company’s inquiry concerning appellant that appellant is totally disabled and will never be able to return to work. According to Dr. Kocher, her primary disabling conditions are panhypopituitarism, epilepsy, blackouts, type 2 diabetes mellitus, and orthostatic hypotension. Dr. Kocher stated that appellant’s date of total disability began on June 9, 2003, and will persist for the rest of her life. Dr. Evans saw appellant on April 5, 2004, for follow-up of her right-sided sciatica and noted that appellant was “still hurting quite a bit.” Dr. Evans prescribed medication and encouraged appellant to continue seeing Dr. Swicegood.

On May 13, 2004, appellant visited Dr. Luke Knox for an independent medical evaluation at the request of St. Edwards. Dr. Knox conducted an extensive review of appellant's past medical history as well as an examination and review of her various tests. Dr. Knox diagnosed appellant with "back and right leg pain with negative MRI scan of the lumbar spine." In his report, he noted that there was no evidence of hip malfunction with hip maneuvers, and appellant was not particularly tender over the trochanteric burse, SI joint, or with pelvic compression. He opined that the changes in her SI joint were "possibly compatible with a sacroilitis." He also stated, "Objective findings are nil. In the face of her SI joint findings on CAT scan, I would determine these to be objective findings to document her work related injury." He also ordered a bone scan. After reviewing the bone scan on May 20, 2004, Dr. Knox noted that the scan was completely normal, and he did not recommend any further treatment. He stated that appellant had reached maximum medical improvement (MMI) and assigned appellant a five percent permanent partial disability rating.

On December 22, 2004, appellant saw Dr. Michael Standefer to obtain her own independent medical evaluation. Dr. Standefer opined that he saw no evidence of an obvious surgical problem but, due to appellant's persistence of her pain, he ordered MRIs of the lumbar spine and pelvis. The MRIs revealed appellant had no significant abnormalities evident in either her lumbar spine or right hip.

On March 17, 2005, a hearing was held before an Administrative Law Judge (ALJ)

to determine the validity of appellant's claim for a five percent impairment rating to the body as a whole. At the hearing, it was stipulated that appellant had sustained a compensable injury on October 15, 2002; that St. Edward and its insurer, Sisters of Mercy Health System, had paid all of appellant's medical expenses; that appellant was entitled to a compensation rate of \$354.00 for temporary total disability and \$265.00 for permanent partial disability; and that appellant reached the end of her healing period on or before June 30, 2003. The issues to be litigated in front of the ALJ included: (1) appellant's entitled to a permanent partial impairment rating of five percent to the whole body; (2) appellant's entitlement to permanent and total disability or wage loss over the five percent impairment; (3) Second Injury Fund liability; (4) attorney's fees.

In an opinion filed June 8, 2005, the ALJ determined that appellant had failed to prove by a preponderance of the evidence that she is entitled to a permanent impairment rating of five percent to the body as a whole. The ALJ rejected Dr. Knox's assessment, noting that the tests Dr. Knox reviewed as well as the tests that he had ordered were all within normal range. The ALJ's discussion concluded with the following:

It is not questioned that this claimant is permanently and totally disabled but it is noted that she has a multitude of problems and these problems seem to be expanding with time and age. The claimant, for years, has taken numerous medications for numerous medical problems and the claimant herself testified that prior to her compensable fall on October 15, 2002, she would have quit working due to her medical problems except for her financial problems...This claimant has continued to sporadically have complaints of low back and right hip pain but it is also noted that she has experienced numerous falls due to seizure and blackouts which are unrelated to her compensable injury which could have exacerbated or caused her to have discomfort in her low back and

hip. Dr. Kocher, on June 30, 2003, sets forth a number of medical problems including major depression which this claimant is suffering from but the medical problems listed do not include low back or hip pain. Therefore, I find no permanent impairment resulting from this claimant's compensable fall of October 15, 2002. I also find that there is no Second Injury Fund liability in this matter.

Appellant appealed this decision to the Workers' Compensation Commission, and after conducting a de novo review of the record, the Commission affirmed and adopted the decision of the ALJ on May 10, 2006, with one Commissioner dissenting. Appellant then filed a timely appeal with this court.

On appeal, appellant argues that there was no substantial evidence to support the Commission's decision that she failed to prove she is entitled to permanent impairment benefits resulting from her compensable fall. In determining the sufficiency of the evidence to support the findings of the Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we will affirm if those findings are supported by substantial evidence. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* It is the function of the Commission to determine the credibility of witnesses and the weight to be given their testimony. *Searcy Indus. Laundry v. Ferren*, 82 Ark. App. 69, 110 S.W.3d 306 (2003). Furthermore, the Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. *Id.* The issue is not whether this court might have reached a different result from that reached by the

Commission, or whether the evidence would have supported a contrary finding. *Smith v. County Market/Southeast Foods*, 73 Ark. App. 333, 44 S.W.3d 737 (2001). We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Id.*

To prove her entitlement to permanent partial disability with regard to the compensable fall on October 15, 2002, appellant was required to show the presence of an abnormality that could reasonably be expected to produce the permanent physical impairment that is alleged. *Crow v. Weyerhaeuser Co.*, 46 Ark. App. 295, 880 S.W.2d 320 (1994). Arkansas Code Annotated § 11-9-704(c)(1)(B) (Repl. 2002) states that "any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." Objective findings are "those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. § 11-9-102(16)(A)(i) (Supp. 2005). In addition, permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. § 11-9-102(4)(F)(ii)(a). "Major cause" is defined as "more than fifty percent of the cause." § 11-9-102(14)(A).

Appellant's argument relies almost exclusively on Dr. Knox's assessment of the CT scan performed on June 13, 2003. In Dr. Knox's letter, dated May 13, 2004, he referenced the SI joint findings on the CT scan and stated these findings were "objective findings to

document her work related injury.” However, our case law has established that the Commission is entitled to examine the basis for a doctor’s opinion in deciding the weight to which that opinion is entitled. *Crow v. Weyerhaeuser Co.*, *supra*. In this case, the Commission examined the basis for Dr. Knox’s whole body impairment rating and determined that the rating was not supported by the tests reviewed and performed. Moreover, we note that the CT scan relied on by Dr. Knox did not actually document objective findings; instead, the scan revealed “mild deformity inferior pubic rami which could be due to previous trauma” and “degenerative change of the sacroiliac joints.” Expert opinions based upon “could” statements lack the definiteness required to meet the claimant’s burden to prove causation pursuant to § 11-9-102(16)(B), which requires medical opinions addressing compensability and permanent impairment to be stated within a reasonable degree of medical certainty. *Frances v. Gaylord Container Corp.*, 341 Ark. 527, 20 S.W.3d 280 (2000).

Appellant also argues that the fluoroscope of the right sacroiliac joint performed by Dr. Swicegood on May 12, 2003, showed objective findings that support Dr. Knox’s proposed impairment rating. First, it is not clear that Dr. Knox reviewed the fluoroscope notes, and even if he did so, he specifically referenced only the CT scan from June 13, 2003, when noting the “objective findings.” Second, there is no evidence that Dr. Swicegood’s observations while giving appellant an injection constituted objective findings of any permanent injury.

In addition, we note that in the same letter by Dr. Knox relied on by appellant, Dr. Knox also stated that “objective findings are nil.” This is in direct contradiction to his next sentence, in which he stated the CT scan showed objective findings. However, as we have observed, it is within the province of the Commission to weigh the medical evidence and resolve any conflicting evidence. Considering the totality of the examinations and tests performed on appellant, the fact that only one doctor opined that he saw objective findings of a work-related injury, and this assessment was based on a CT scan report that did not in fact document any objective findings, we find that there was substantial evidence to support the Commission’s finding that appellant did not prove she is entitled to a permanent impairment rating of five percent to the body as a whole as a result of her compensable fall on October 15, 2002.

Affirmed.

VAUGHT and MILLER, JJ., agree.

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